1879

11-301

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 186.

MRS. WIDOW B. FLEITAS, PLAINTIFF IN ERROR,

vs.

JOHN COCKREM AND WILLIAM F. HALSEY, RECEIVERS OF THE NEW ORLEANS NATIONAL BANKING ASSOCIATION.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF LOUISIANA.

FILED SEPTEMBER 26, 1877.

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INDEX.

	Original.	Print.
Petition	1	1
Citation	3	1
Marshal's return	4	2
Exception	5	2
Transcript of record from 6th district court for the parish of Orleans	6	3
Exception submitted	18	7
Order on exception	18	7
Order, exception dismissed	19	7
Supplemental petition praying for attachment, and order thereon	20	7
Bond for attachment	22	8
Writ of attachment	25	9
Marshal's return	26	9
Bond for release of property attached	27	10
Two rules	29	10
Rules submitted	31	11
Order, two rules dismissed	31	11
Motion and order as to bills of exceptions	32	12
Default	32	12
Bill of exceptions No. 1	32	12
Bill of exceptions No. 2	35	13
Receipts	39, 40	14
Citation	40	15
Marshal's return	41	15
Motion and order to amend marshal's return	42	15
Default on supplemental petition	42	15
Verdict	43	16

	Original.	Print.
Judgment	44	16
Petition for writ of error	45	17
Order thereon	47	17
Bond for writ of error	47	17
Motion and order to file additional bond	49	18
Additional bond	50	18
Clerk's certificate	53	19
Writ of error	54	19
Citation in error	55	20

1 *Petition.—Filed December 14th, 1876.*

UNITED STATES OF AMERICA:

Circuit court of the United States for the fifth circuit and district of Louisiana.

COCKREM & HALSEY, RECEIVERS, *vs.* WIDOW B. FLEITAS. } No. 8026.

To the honorable the judges of the circuit court of the United States for the fifth circuit and district of Louisiana:

The petition of John Cockrem and William F. Halsey, receivers, duly appointed in the suit No. 7064 in said court, and who reside in New Orleans, Louisiana, and are citizens of said State, respectfully shows:

That Widow B. Fleitas, citizen of and residing in the State of Mississippi, is indebted unto your petitioners in the sum of ($5,000) five thousand dollars, with interest thereon at the rate of five per centum
2 per annum from the 21st day of December, 1871, until paid, for this, to wit:

Your petitioners are holders and owners of a certain promissory note made by said Widow B. Fleitas, and endorse' by the said F. B. Fleitas, in the words and figures following, to wit:

$5,000.00.] NEW ORLEANS, *Sept. 14th*, 1871.

Ninety-five days after date I promise to pay to the order of F. B. Fleitas five thousand $\frac{00}{100}$ dollars, at New Orleans Banking Ass'n, value received.

(Signed) V'VE B'MY FLEITAS.

(Endorsed:) F. B. Fleitas.

(Endorsed also:) I hereby waive protest and demand of protest, and hold myself responsible on this note as it legally protested.

F. B. FLEITAS.

DEC. 21, '71.

Petitioners' amicable demand of payment from said defendant, who promised, but neglected and still doth neglect and refuse the same.

Wherefore petitioners pray that said Widow B. Fleitas be cited to appear and answer this petition, and that after due proceedings
3 she be condemned to pay *pay* petitioners the aforesaid sum of ($5,000) five thousand dollars, with interest thereon at the rate of five per centum per annum from the 21st day of December, 1871, until paid, and costs of suit.

And petitioners pray for general relief.

(Signed) ROUSE & GRANT,
Att'ys for Petitioners.

Citation.—Issued December 14th, 1876.

The President of the United States of America to the marshal for the district of Louisiana, greeting:

COCKREM & HALSEY, RECEIVERS, &C., *vs.* WIDOW B. FLEITAS. } No. 8026.

You are hereby commanded to summon Widow B. Fleitas, a citizen

of the State of Mississippi, to comply with the demand of John Cockrem and William F. Halsey, receivers, duly appointed in the suit No. 7064 in this court, and citizens of the State of Louisiana, con-
4 tained in the petition, of which a copy accompanies this citation, or to deliver her answer to the same in the office of the *office of the* clerk of the circuit court of the United States, fifth judicial circuit, and district of Louisiana, in the city of New Orleans, in ten days after service hereof, or judgment will be rendered against her by default, which delay is increased one day for every ten miles the defendant's residence is distant from New Orleans, the place where the court is held. And that you make due return hereof on the first Monday of January, 1877.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, at the city of New Orleans, this 14th day of December, A. D. one thousand eight hundred and seventy-six, and of the Independence of the United States of America the 101st year.

[SEAL.] (Signed) F. B. VINOT,
Dy Clerk.

Marshal's return.

5 Received December 15th, 1876, by the U. S. marshal, and on the same day, month, and year served a copy of within citation and accompanying petition on Widow B. Fleitas, named herein, by handing the same to her in person.

New Orleans, Dec. 16th, 1876.

(Signed) J. R. G. PITKIN,
U. S. Marshal,
By S. W. REED,
Dy U. S. Marshal.

Exception.—Filed December 21st, 1876.

To the hon. the circuit court of the United States for the fifth circuit, district of Louisiana:

To the petition and demand filed in this hon. court by Cockrem and Halsey, receivers, &c., vs. Mrs. Widow B. Fleitas, suit No. 8026, the defendant appears and excepts upon the following grounds, to wit:

Defendant alleges that the same plaintiffs for the same cause of action instituted suit against her in the sixth district court of the parish of Orleans, on or about the 10th day of November, 1876.

6 That on or about the 5th of December following, the defendant made an application to the said district court for the removal of said cause to the circuit court of the United States for the fifth circuit, district of Louisiana, and tendered therewith a good and sufficient bond and security, as the law directs, for the said removal of the said cause.

That on the said 5th day of December the judge of said court granted and signed an order for the removal of said cause to this hon. court, in conformity to law.

The defendant alleges that said cause is still pending, and that the plaintiffs could not legally institute this suit before the former suit was discontinued and the costs paid.

Wherefore she prays that this suit be dismissed at plaintiffs' costs.

(Signed) WM. W. KING,
Att'y for Def't.

Transcript of record.—Filed January 3d, 1877.

7 State of Louisiana, sixth district court for the parish of Orleans.

JOHN COCKREM & W. F. HALSEY, REC'RS, &C., *vs.* MRS. DOROTHEA FLEITAS, WIDOW, &C. } No. 9088.

Petition.—Filed Nov. 10th, 1876.

To the honorable the judge of the sixth district court for the parish of Orleans:

The petition of John Cockrem and William F. Halsey, receivers, duly appointed by the honorable the circuit court of the United States for the fifth circuit, district of Louisiana, in suit of N. W. Casey, subrogated, vs. C. Cavaroc & Son et al., No. 7064 of the docket of said court, and who reside in New Orleans, respectfully shows:

That Mrs. Dorothea Fleitas, widow of the late Bartholomew Fleitas, and now within the jurisdiction of this court, is justly and truly unto your petitioners indebted in the sum of five thousand dollars,
8 with interest thereon at the rate of five per cent. per annum from December 21st, 1871, until paid, for this, to wit:

That petitioners are the holders and owners of a certain promissory note, dated New Orleans, September 14th, 1871, due ninety-five days after date, for the sum of five thousand dollars, drawn by said Widow Bartholomew Fleitas, to the order of F. B. Fleitas, and by him endorsed in blank, all of which will more fully appear by reference to said note, which is hereunto annexed and made part hereof.

That said note is due and owing, with interest as stated, and that said Mrs. Widow Bartholomew Fleitas refuses to pay the same, notwithstanding amicable demand.

Wherefore petitioners pray that said Mrs. Dorothea Fleitas, widow of the late Bartholomew Fleitas, be cited to appear and answer this petition, and that after all due proceedings there be judgment in favor of petitioners and against said Mrs. Dorothea Fleitas, widow of the late Bartholomew Fleitas, for the sum of five thousand dollars, with
9 interest thereon at the rate of five per cent. per annum, from December 21st, 1871, until paid, and all costs of suit.

And petitioners further pray for general and equitable relief.

CLARKE, BAYNE & RENSHAW,
Att'ys for Pet'rs.

Note annexed to petition.

$5,000.00. | NEW ORLEANS, *Sept.* 14, 1871.

Ninety-five days after date I promise to pay to the order of F. B. Fleitas five thousand $\frac{00}{100}$ dollars at New Orleans Banking Ass'n, value received.

V'VE B'MY FLEITAS.

No. Due 18–21 Dec.

(Endorsed:) F. B. Fleitas.

I hereby waive protest and demand of protest, and hold myself responsible on this note as if legally protested.

Dec. 21, '71.

F. B. FLEITAS.

Citation—Issued Nov. 10th, 1876.

Citation.

10 State of Louisiana, sixth district court for the parish of Orleans, in the city of New Orleans.

JOHN COCKREM & W. F. HALSEY, RECEIVERS, *vs.* MRS. WIDOW BARTHOLOMEW FLEITAS. } No. 9088.

Mrs. Dorothea Fleitas, widow of the late Bartholomew Fleitas, New Orleans:

You are hereby summoned to comply with the demand contained in the petition of which a copy accompanies this citation, or to deliver your answer to the same in the office of the clerk of the sixth district court for the parish of Orleans, within ten days after the service hereof.

Witness the honorable Arthur Saucier, judge of the said court, this 10th day of Nov., in the year of our Lord 1876.

F. WALL,
Deputy Clerk.

Court-house opposite Jackson Square, corner Chartres street and St. Anthony's alley.

11 *Sheriff's return.—Filed Nov. 27th, 1876.*

Received Nov. 11th, 1876, and on the 18th day, same month and year, served a copy of within citation and accompanying petition on Mrs. Dorothea Fleitas in person.

Ret. same day.

PHILIP MUNCH,
Dy Sh'ff.

Sh'ff's fees, $2.00.

Petition for transfer.—Filed Dec. 5th, 1876.

To the hon. the judge of the sixth district court of the parish of Orleans:

The petition of Mrs. Dorothea Fleitas, widow of the late Barthelemy Fleitas, respectfully represents:

That suit has been instituted against her in this hon. court by John Cockrem and William J. Halsey, of the docket No. 9088.

She alleges that she is a citizen of the State of Mississippi and is desirous of removing the said cause from the State court to the
12 United States circuit court for the fifth circuit, district of Louisiana, and that the amount in controversy in said suit, exclusive of costs, exceeds five thousand dollars, and that this application is made before or at the term at which said cause could be first tried and before the trial thereof.

Wherefore she prays for an order of removal of said suit to the said United States circuit court upon filing herewith a bond with good and sufficient surety, as the law directs, for the sum of five hundred dollars, and for all other relief in the premises.

WM. W. KING,
Att'y for Pet'r.

Affidavit.

The allegations in the foregoing petition are true.

V'VE B'MY FLEITAS.

Sworn to & subscribed before me this 5th day of Dec., 1876.

WM. H. HOLMES,

Second Justice of the Peace, Parish of Orleans.

Bond.

JOHN COCKREM & W. F. HALSEY, receivers, &c.,
vs.
MRS. DOROTHEA FLEITAS, WIDOW OF BARthelemy Fleitas.
} 6th D. C. No. 9088.

Know all men by these presents that we, Mrs. Dorothea Fleitas, Widow Barthelemy Fleitas, as principal, and S. H. Boyd, a citizen of New Orleans, as surety, are held and firmly bound unto John Cockrem and W. J. Halsey, their successors, executors, administrators, heirs, and assigns, in the sum of five hundred dollars, lawful money of the United States, to be paid to the said Cockrem and Halsey, their successors, executors, administrators, heirs, and assigns, for which payment, well and truly to be made, we bind ourselves in solido, and each of our successors, executors, administrators, heirs, and assigns, firmly by these presents, sealed with our seals, and dated this the 4th day of December, 1876.

Whereas the said Mrs. Fleitas has this day presented to the hon. the sixth district court of the parish of Orleans, a petition praying for an order for the removal of the suit of J. Cockrem and W. J. Halsey
14 against her from this hon. court to the United States circuit court:

Now, the condition of the above obligation is such that we, the above bound Mrs. Fleitas, as principle, and S. H. Boyd, as surety, shall enter in said circuit of the United States, on the first day of its next session, a copy of the record in such suit, and shall pay all costs that may be awarded by said court, if said court shall hold that said suit was wrongfully or improperly awarded, then the said obligation shall be null and void, otherwise to remain in full force and effect.

V'VE B'MY FLEITAS. [SEAL.]
S. H. BOYD. [SEAL.]

Order of court.

Let this petition be filed, and let this cause be removed for trial to the circuit court of the United States for the fifth circuit and district of Louisiana, as within prayed for, and according to law, upon petitioner giving bond with good and solvent security in the sum of
15 five hundred dollars, conditioned as the law directs.

New Orleans, December 5th, 1876.

A. SAUCIER, *Judge.*

Clerk's certificate.

I, John J. O'Brien, clerk of the sixth district court for the parish of Orleans, hereby certify that the foregoing twelve pages do contain a

Citation—Issued Nov. 10th, 1876.

Citation.

10 State of Louisiana, sixth district court for the parish of Orleans, in the city of New Orleans.

JOHN COCKREM & W. F. HALSEY, RECEIVERS,
vs.
MRS. WIDOW BARTHOLOMEW FLEITAS. } No. 9088.

Mrs. Dorothea Fleitas, widow of the late Bartholomew Fleitas, New Orleans:

You are hereby summoned to comply with the demand contained in the petition of which a copy accompanies this citation, or to deliver your answer to the same in the office of the clerk of the sixth district court for the parish of Orleans, within ten days after the service hereof.

Witness the honorable Arthur Saucier, judge of the said court, this 10th day of Nov., in the year of our Lord 1876.

F. WALL,
Deputy Clerk.

Court-house opposite Jackson Square, corner Chartres street and St. Anthony's alley.

11 *Sheriff's return.—Filed Nov. 27th, 1876.*

Received Nov. 11th, 1876, and on the 18th day, same month and year, served a copy of within citation and accompanying petition on Mrs. Dorothea Fleitas in person.

Ret. same day.

PHILIP MUNCH,
Dy Sh'ff.

Sh'ff's fees, $2.00.

Petition for transfer.—Filed Dec. 5th, 1876.

To the hon. the judge of the sixth district court of the parish of Orleans:

The petition of Mrs. Dorothea Fleitas, widow of the late Barthelemy Fleitas, respectfully represents:

That suit has been instituted against her in this hon. court by John Cockrem and William J. Halsey, of the docket No. 9088.

She alleges that she is a citizen of the State of Mississippi and is desirous of removing the said cause from the State court to the

12 United States circuit court for the fifth circuit, district of Louisiana, and that the amount in controversy in said suit, exclusive of costs, exceeds five thousand dollars, and that this application is made before or at the term at which said cause could be first tried and before the trial thereof.

Wherefore she prays for an order of removal of said suit to the said United States circuit court upon filing herewith a bond with good and sufficient surety, as the law directs, for the sum of five hundred dollars, and for all other relief in the premises.

WM. W. KING,
Att'y for Pet'r.

Affidavit.

The allegations in the foregoing petition are true.

V'VE B'MY FLEITAS.

Sworn to & subscribed before me this 5th day of Dec., 1876.

WM. H. HOLMES,

Second Justice of the Peace, Parish of Orleans.

Bond.

JOHN COCKREM & W. F. HALSEY, receivers, &c.,
vs.
MRS. DOROTHEA FLEITAS, WIDOW OF BARthelemy Fleitas. } 6th D. C. No. 2088.

Know all men by these presents that we, Mrs. Dorothea Fleitas, Widow Barthelemy Fleitas, as principal, and S. H. Boyd, a citizen of New Orleans, as surety, are held and firmly bound unto John Cockrem and W. J. Halsey, their successors, executors, administrators, heirs, and assigns, in the sum of five hundred dollars, lawful money of the United States, to be paid to the said Cockrem and Halsey, their successors, executors, administrators, heirs, and assigns, for which payment, well and truly to be made, we bind ourselves in solido, and each of our successors, executors, administrators, heirs, and assigns, firmly by these presents, sealed with our seals, and dated this the 4th day of December, 1876.

Whereas the said Mrs. Fleitas has this day presented to the hon. the sixth district court of the parish of Orleans, a petition praying for an order for the removal of the suit of J. Cockrem and W. J. Halsey
14 against her from this hon. court to the United States circuit court:

Now, the condition of the above obligation is such that we, the above bound Mrs. Fleitas, as principle, and S. H. Boyd, as surety, shall enter in said circuit of the United States, on the first day of its next session, a copy of the record in such suit, and shall pay all costs that may be awarded by said court, if said court shall hold that said suit was wrongfully or improperly awarded, then the said obligation shall be null and void, otherwise to remain in full force and effect.

V'VE B'MY FLEITAS. [SEAL.]
S. H. BOYD. [SEAL.]

Order of court.

Let this petition be filed, and let this cause be removed for trial to the circuit court of the United States for the fifth circuit and district of Louisiana, as within prayed for, and according to law, upon petitioner giving bond with good and solvent security in the sum of
15 five hundred dollars, conditioned as the law directs.

New Orleans, December 5th, 1876.

A. SAUCIER, *Judge.*

Clerk's certificate.

I, John J. O'Brien, clerk of the sixth district court for the parish of Orleans, hereby certify that the foregoing twelve pages do contain a

full, true, and complete transcript of the record, including all proceedings had and documents filed in the cause wherein John Cockrem and W. F. Halsey, receivers, are plaintiffs, and Mrs. Widow Bartholomew Fleitas is defendant, which said cause was instituted in our said court on the tenth day of November, anno Domini eighteen hundred and seventy-six, under the No. 9088.

In testimony whereof I hereunto set my hand and affix the seal of our said court at the city of New Orleans, this 6th day of December, in the year of our Lord one thousand eight hundred and seventy-
16 six, and of the Independence of the United States of America the 101st.

[SEAL.] (Signed) JOHN J. O'BRIEN, *Clerk.*

Certificate of the judge.

I, Arthur Saucier, sole judge of the sixth district court for the parish of Orleans, do certify that John J. O'Brien is clerk of said court; that the same is a court of record, having common-law jurisdiction; that the signature "John J. O'Brien" to the foregoing certificate is in the proper handwriting of him, the said John J. O'Brien, clerk; that to his official acts as such full faith and credit are due and owing.

And I do further certify that said attestation is in due form of law.

Given under my hand and seal at the place and on the day and date to the foregoing certificate written.

(Signed) A. SAUCIER, *Judge.*

17 *Certificate of clerk.*

I, John J. O'Brien, clerk of the sixth district court for the parish of Orleans, hereby certify that the Hon. Arthur Saucier is sole judge of said court, duly commissioned, qualified, acting and presiding as such, and that the signature "A. Saucier" to the foregoing certificate is in the proper handwriting of him, the said Hon. Arthur Saucier, judge.

In testimony whereof I have hereunto set my hand and affixed the seal of our said court at the city of New Orleans, on the day and date to the first aforegoing certificate written.

[SEAL.] (Signed) JOHN J. O'BRIEN, *Clerk.*

Exception submitted.—Extract from the minutes, November term, 1867.

NEW ORLEANS, *Wednesday, January 3d,* 1877.

Court met pursuant to adjournment.

Present, Hon. E. C. Billings, district judge.

18 COCKREM & HALSEY, REC'RS, *vs.* WIDOW B. FLEITAS. } No. 8026.

The exception in this cause was called for trial by the court, the jury having been waived in writing—Rouse & Grant for plaintiffs; W. W. King for exceptor—and after hearing the pleadings and argument, the court took time to advise.

Order on exception.—Extract from the minutes of January 9, 1877.

J. COCKREM & AL., REC'RS, *vs.* WIDOW B. FLEITAS. } No. 8026.

Upon due consideration of the plea of lis pendens, the court, for reasons assigned in writing, orders that the plaintiffs may elect to proceed in this case upon paying the costs in the first, and if he does so elect within the period of ten days and does discontinue the first cause and pay the costs therein, the court will overrule the plea, otherwise maintain it.

19 *Order, exception dismissed.—Extract from the minutes of Jan'y 10th, 1877.*

JNO. COCKREM & WM. F. HALSEY, receivers, &c., *vs.* MRS. B. FLEITAS. } No. 8026.

Come now said John Cockrem and William F. Halsey, receivers, etc., plaintiffs herein, and considering the judgment of this hon. court herein, upon the exception of the defendant, they do now elect to discontinue the suit by them brought against said defendant in said sixth district court for the parish of Orleans, and removed therefrom to this hon. court; and thereupon the court, considering said election, and it appearing that the costs of said suit have all been paid by plaintiffs as per receipts on file, on motion of Rouse & Grant, attorneys for plaintiffs, it is ordered that said suit, so removed from said sixth district court, be, and the same is hereby, discontinued at said plaintiffs' costs; and it is further ordered that said exception herein filed by said defendant be dismissed.

20 *Supplemental petition praying for attachment, and order thereon.—Filed January 10th, 1877.*

In U. S. circuit, district of Louisiana.

JOHN COCKREM & W. F. HALSEY, receivers, etc., *vs.* MRS. B. FLEITAS. } No. 8026.

To the hon. the judges of said court:

The supplemental petition of John Cockrem and William F. Halsey, receivers, etc., plaintiffs herein, respectfully shows that the sum of five thousand dollars, with interest thereon, at the rate of five per cent. per annum, from December 21st, 1871, is due and owing by Mrs. B. Fleitas, said defendant, as in said plaintiffs' petition herein is stated, and that said defendant resides out of the State of Louisiana.

Wherefore petitioners pray that the annexed bond and affidavit be considered, that a writ of attachment be issued commanding the U. S. marshal to seize the property, rights, and credits of the defendant, and hold the same to satisfy the judgment of the court in the
21 premises by privilege and preference thereon; and plaintiffs pray

for judgment against said defendant, and in their favor, that she be condemned to pay them said sum of five thousand dollars, with legal interest from December 21st, 1871, and costs of suit, as already prayed by them in their petition now on file. And they pray for general relief.

(Signed) ROUSE & GRANT,
Att'ys for Pl'ffs.

STATE AND DISTRICT OF LOUISIANA:

This day personally appeared before me, the undersigned authority, William F. Halsey, one of the plaintiffs named in the foregoing petition, who, being duly sworn according to law, deposed and said that the facts and allegations made and stated in the foregoing supplemental petition are true, and that he verily believes that said defendant, Mrs. B. Fleitas, resides out of the State of Louisiana.

(Signed) W. F. HALSEY.

Subscribed & sworn to before me this 5th day of January, 1877.

(Signed) F. B. VINOT,
D'y Clerk.

22 *Order.*

Let a writ of attachment be issued as within prayed for, upon the plaintiffs giving bond in the sum of thirty-two hundred dollars, with solvent surety, and conditioned as the law directs.

New Orleans, January 10th, 1877.

(Signed) EDWARD C. BILLINGS, *Judge.*

Bond for attachment.—Filed January 10th, 1877.

UNITED STATES OF AMERICA:

Know all men by these presents, that we, John Cockrem and William F. Halsey, receivers pendente lite, in suit of Cockrem, receiver, N. W. Casey substituted, vs. Cavaroc et al., No. 7064, U. S. circuit court, dist. of La., as principals, and William F. Halsey as surety, are held and firmly bound, jointly and severally, unto T. A. Woolfley, clerk of the United States circuit court for the fifth judicial circuit and district of Louisiana, in the sum of thirty-two hundred dollars, lawful money of the United States of America, to be paid to the said F. A. Woolfley,
23 clerk aforesaid, his heirs, executors, administrators, and assigns, and successors in office, for which payment, well and truly to be made, we bind ourselves, and each of us by himself, and each of our heirs, executors, and administrators, firmly by these presents, sealed with our seals, and dated this tenth day of January, in the year of our Lord eighteen hundred and seventy-seven.

Whereas said Cockrem and Halsey, receivers as aforesaid, have this day presented a petition to the honorable the circuit court of the United States for the fifth circuit holding sessions in and for the district of Louisiana, praying for a writ of attachment against the property, rights, and credits of Mrs. B. Fleitas, the defendant in the suit brought by them against her, and numbered 8026 upon the docket of said circuit court:

Now, the condition of the above obligation is, that we, the above bounden John Cockrem & William F. Halsey, receivers as aforesaid, principals, and William F. Halsey as surety, will well and truly pay to

the said F. A. Woolfley, clerk as aforesaid, or to his successors
24 in office, for the use of the defendant in said suit, all such damages as she may recover against us in case it should be decided that the said attachment was wrongfully obtained.

(Signed) JOHN COCKREM, [L. S.]
" WM. F. HALSEY, [L. S.]
Receivers.
" WM. F. HALSEY, [L. S.]
Surety.

Signed, sealed, & delivered in the presence of—
J. D. ROUSE.

Bond approved Jan'y 10th, 1877.
(Signed) EDWARD C. BILLINGS,
Judge.

25 *Writ of attachment.—Issued January 10th*, 1877.

UNITED STATES OF AMERICA:
Circuit court of the United States, fifth judicial circuit and district of Louisiana.

JOHN COCKREM & W. F. HALSEY, RECEIVERS, &c.,
vs.
MRS. B. FLEITAS.
No. 8026.

The President of the United States to the marshal of the United States for the district of Louisiana, greeting:

You are hereby commanded to attach and take into your possession, according to law, the property, rights, and credits of the defendant, Mrs. B. Fleitas, that may be found within our said district, to satisfy the plaintiffs, John Cockrem and William F. Halsey, receivers, &c., of their claim for the sum of five thousand dollars, with interest thereon, at the rate of five per centum per annum, from December 21st, 1871, until paid, and costs, and to hold the same to satisfy the judgment of the court in the premises by privilege and preference thereon.

26 And of what you may do herein, make due return to our said court.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, this tenth day of January, 1877.

[SEAL.] (Signed) F. B. VINOT.
Dy Clerk.

Marshal's return.

Received January 11th, 1877, by the U. S. marshal, and on the 12th day of January, 1877, I attached and took into my possession, at the Corinne Plantation, parish of Plaquemines, the said plantation, and the sugar-house thereon, with its contents, consisting of sugar and other property sufficient to satisfy the within claim.

I also released the said property from seizure on the 13th of January, 1877, claimant having given a bond for its release, which bond I have transferred according to law.

N. O., February 23d, 1877.
(Signed) J. R. G. PITKIN,
U. S. Marshal,
By JOHN FAHY,
Dy Marshal.

27 *Bond for release of property attached.—Filed January 13th, 1877.*

UNITED STATES OF AMERICA:

Know all men by these presents that we, Mrs. Widow B. Fleitas and F. H. Boyd and Cyrus Chism, citizens of New Orleans, are held and firmly bound, jointly and severally, unto the marshal of the United States circuit court for the fifth circuit, district of Louisiana, in the sum of nine thousand one hundred dollars, lawful money of the United States of America, to be paid to the said marshal, or his successors in office, or his heirs, executors, administrators, and assigns; for which payment, well and truly to be made, we bind ourselves, and each of us by himself, and each of our heirs, executor, and administrators, firmly by these presents, sealed with our seals, and dated the thirteenth day of January, in the year of our Lord eighteen hundred and seventy-seven.

Whereas the said Cockrem & Halsey, receivers, have caused, in their suit in said circuit court against the said Mrs. Fleitas, No. 8026,
28 an attachment to be issued against the property of the said Mrs. Fleitas, which has been executed upon her property to secure the payment of their demand, to wit, the sum of five thousand dollars, with interest at five per cent. from the 21st day of December, 1871, & costs:

Now, the condition of the above obligation is, that we, the above-bounden Mrs. Fleitas and F. H. Boyd and Cyrus Chism, will well and truly pay to the said marshal any such judgment as may be rendered against the said Mrs. Widow B. Fleitas in the said suit, and when done the said bond to be void.

(Signed) MRS. W'DOW B'MY FLEITAS. [L. S.]
" F. H. BOYD. [L. S.]
" CYRUS CHISM. [L. S.]

Signed, sealed, & delivered in the presence of—
(Signed) WM. W. KING.

No objection to this bond.
(Signed) CLARKE, BAYNE & RENSHAW.
ROUSE & GRANT.

Transfer.

U. S. MARSHAL'S OFFICE,
New Orleans, Jan'y 13, 1877.

I do hereby transfer, assign, and set over to plaintiffs herein all my right, title, and interest in & to the within bond.

(Signed) J. R. G. PITKIN,
U. S. Marshal,
By J. B. STOCKTON,
Deputy.

29 *Rule.—Entered & filed January 13th, 1877.*

COCKREM & HALSEY, REC'RS, *vs.* MRS. W'OW B. FLEITAS. } U. S. C. C.—No. 8026.

Upon suggestion of W. W. King, of counsel for defendant, that the

order of this hon. court, rendered in this case on the 10th inst., in the above case, overruling the exception of defendant, was granted in error and by mistake, it is ordered by the court that plaintiffs show cause, on 20th inst., at 11 a. m., if any they have, why the said order should not be rescinded upon the following grounds, to wit:

1st. The suit between the same parties for the same cause of action removed from the sixth district court of the parish of Orleans to this hon. court has not been discontinued, and the plaintiffs cannot proceed in this court.

2nd. The said order was granted ex parte, and without legal proof being adduced before the court.

Rule.—Entered & filed January 13, 1877.

30 COCKREM & HALSEY, REC'RS, } U. S. C. C.—No. 8026.
vs.
MRS. W'OW B. FLEITAS. }

Upon the suggestion of W. W. King, of counsel for defendant, that the attachment issued in this case was illegally obtained and ought to be dismissed, it is ordered by the court that the plaintiffs show cause, if any they have, on Saturday, the 20th inst., why the said attachment should not be dismissed and set aside upon the following grounds, to wit:

1st. The attachment was issued in the case after the suit had been dismissed, and before complying with the conditions imposed on the plaintiffs.

2d. The attachment was issued after the defendant had made an appearence in the case, and had submitted to the jurisdiction of the court.

3d. The attachment was issued without the plaintiffs giving the bond required by law as a prerequisite to the issuing on an attachment.

31 4th. The attachment is insufficient in amount, and the principals and plaintiffs have given no security.

5th. The affidavit is insufficient.

Rules submitted.—Extract from the minutes of Jan'y 20, 1877.

COCKREM & HALSEY } No. 8026.
vs.
W'DOW B. FLEITAS. }

The rules herein taken on 13th instant were called up. W. W. King for plaintiff in rules; Rouse & Grant & Clarke, Bayne & Renshaw for defendants in rules.

And after hearing argument the court took time to consider.

Order, rules dismissed.—Extract from the minutes of Jan'y 23, 1876.

COCKREM & HALSEY } No. 8026.
vs.
W'DOW B. FLEITAS. }

The court having duly considered the two rules taken *taken* by
32 the defendant on the 13th instant, and the argument of counsel thereon, does now order that said rules be dismissed.

Motion & order as to bills of exceptions.—Extract from the minutes of Jan'y 23, 1877.

COCKREM & HALSEY, REC'RS, vs. W'DOW B. FLEITAS. } No. 8026.

On motion of W. W. King, esq., ordered that five days be allowed him to present his bills of exceptions in this cause.

Default.—Extract from the minutes of Jan'y 26th, 1877.

COCKREM & HALSEY, REC'RS, vs. W'DOW B. FLEITAS. } No. 8026.

On motion of Rouse and Grant, of counsel for plaintiffs, and on showing to the court that the defendant has failed to answer the petition, altho' duly cited, ordered that judgment by default be entered against her.

Bill of exceptions No. 1.—Filed January 31st, 1877.

33 United States circuit court, fifth circuit, district of La.

JOHN COCKREM & WM. F. HALSEY vs. WIDOW B. FLEITAS. } No. 8026.

No. 1.

Be it remembered that on the trial of the motion in this cause, made by counsel for defendant, to set aside a previous order given by the court on an ex parte motion of the plaintiffs, as to the discontinuance of the other suit removed to this court, between the same parties, for the grounds stated in the rule; the ex parte order sought to be vacated being as follows:

"Come now said John Cockrem and William F. Halsey, receivers, etc., plaintiffs herein, and considering the judgment of this hon. court herein upon the exception of the defendants, they do now elect to discontinue the suit by them brought against said defendant in said sixth district court for the parish of Orleans, and removed therefrom to this hon.
34 court, and thereupon the court, considering said election, and it appearing that the costs of said suit have all been paid by plaintiffs, as per receipt on file, on motion of Rouse & Grant, attorneys for plaintiffs, it is ordered that said suit so removed from the said sixth district court be, and the same is hereby, discontinued at said plaintiffs' costs, and it is further ordered that said exception herein filed by said defendant be dismissed."

On the trial of this rule to vacate it appeared that the only evidence adduced to the court at the time it was entered was the statement of the attorney who asked for the entry of the order [and the receipts on file showing payment of costs, which are hereto attached],* but there was

*The lines within brackets were inserted by the judge.

no question made as to the statement being true that the costs had been paid, and the court refused the motion to vacate the order.

To which ruling of the court and refusal counsel for defendant then and there excepted, and, since the matters do not appear of record, present this his bill of exceptions, and prays that the same may be
35 signed and made part of the record herein, which is accordingly done.

(Signed) EDWARD C. BILLINGS, *Judge.*

Bill of exceptions No. 2.—Filed January 31st, 1877.

United States circuit court, fifth circuit, district of La.

JOHN COCKREM & WM. F. HALSEY
vs.
WIDOW B. FLEITAS. } No. 8026.

No. 2.

Be it remembered that on the trial of the rule in this cause taken to set aside the attachment issued herein upon the grounds stated in the rule, the only evidence before the court that the previous suit between the same parties had been discontinued was the order entered upon the minutes of the court, which is as follows:

"Come now said John Cockrem and Wm. F. Halsey, receivers, etc., plaintiffs herein, and considering the judgment of this hon. court herein upon the exception of the defendant, they do now elect to dis-
36 continue the suit by them brought against said defendant in said sixth district court for the parish of Orleans and removed therefrom to this hon. court, and thereupon the court considering said election and it appearing that the costs of said suit have all been paid by plaintiffs as per receipts on file, on motion of Rouse & Grant, attorneys for plaintiffs, it is ordered that said suit so removed from said sixth district court be and the same is hereby discontinued at said plaintiffs' costs; and it is further ordered that said exception herein filed by said defendant be dismissed."

And the counsel for the defendant asked the court to hold that a cause could not be discontinued by a motion made in another case; the court held that the causes being between the same parties, an order relative to both may be entered in either, and that the said order, having been entered upon the minutes of the court, was sufficient.

37 Counsel for defendant presented a second *a second* question to the court, viz: That the attachment in this case issued for over six thousand dollars, while the plaintiffs had given bond for only thirty-two hundred dollars; that the statute of Louisiana required that the bond should exceed by one-half the amount of plaintiffs' claim.

The court held that the facts with reference to the amount of the claim and bond were as contended for by the plaintiffs' counsel, but that the statute of Louisiana required that the bond should be only for the amount which exceeded one-half of the plaintiffs' claim.

The defendant's counsel submitted a third point, viz: That there was no legal surety given on the bond.

It is conceded that the only surety given was one of the plaintiffs in his individual capacity, the suit being brought by the plaintiffs in their capacities as receivers; the court held that it was competent for the plaintiffs in their individual capacity to be sureties in this suit

38 brought by them as receivers, there being no question as to the sufficiency of the surety in other respects.

Counsel for defendant presented a fourth point, viz: That the attachment issued in the case after the defendant had appeared herein and voluntarily submitted to the jurisdiction of the court.

The court held that while the fact was as contended for by the defendant, the attachment nevertheless rightfully issued.

Counsel for the defendant presented a fifth point, viz: That the affidavit for the attachment was insufficient, the plaintiff's not swearing positively to the fact that the defendant resided out of the S ate.

But the court held that the affidavit, being in the form prescribed by the statutes, was sufficient.

To all of which rulings on the part of the court the defendant's counsel then and there excepted, and, since these matters do not appear of record, he presents this his bill of exceptions, and prays that the

39 same may be signed and made a part of the record herein, which is done accordingly.

(Signed) EDWARD C. BILLINGS, *Judge.*

Receipts referred to in defendant's bill of exceptions No. 1.—*Filed Jan'y* 10, 1877.

6th D. C. of parish of Orleans.

COCKREM ET ALS., RECEIVERS,
vs.
MRS. WIDOW B. FLEITAS.

Received from Messrs. Rouse & Grant, att'ys for pl'ffs, twelve $\frac{50}{100}$ dollars, costs of record for the removal of said cause to the U. S. C. C. January 10th, 1877.

(Signed) WM. W. KING,
Att'y for Def'ts.

(Endorsement on above:)

I hereby certify that the clerk's costs in this case have been p'd by pl'ff.

N. O., January 10th, 1877.

(Signed) FRANK WALL, *D'y.*

No. 9088. Clarke, Payne & Renshaw, attorneys, 6th district court for the parish of Orleans.

JOHN COCKREM ET ELS.
vs.
MRS. W'DOW B. FLEITAS.

40 I hereby certify that the sheriff's fees in this case amount to two dollars.

Wag. $2.00

(Signed) W. G. BOYLAN,
Deputy Sheriff.

NEW ORLEANS, *Jan'y 10th*, 1877.

Received payment,

N. O., January 10th, 1877.

(Signed) EDWIN HARRIS,
Cash'r.

Citation.—Issued February 3d, 1877.

The President of the United States of America to the marshal of the district of Louisiana, greeting:

JOHN COCHREM & W. F. HALSEY, REC'RS, *vs.* MRS. B. FLEITAS. } No. 8026.

You are hereby commanded to summon Mrs. B. Fleitas, a citizen of the State of Mississippi, to comply with the demand of John Cockrem and William F. Halsey, receivers, duly appointed in the suit No. 7064, in this court, and citizens of the State of Louisiana, contained in the supplemental petition of which a copy accompanies this citation, or to deliver her answer to the same in the office of the clerk of the
41 circuit court of the United States, fifth judicial circuit and district of Louisiana, in the city of New Orleans, in ten days after service hereof, or judgment will be rendered against her by default, which delay is increased one day for every ten miles the defendant's residence is distant from New Orleans, the place where the court is held. And that you make due return hereof on the first Monday of March, 1877.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, at the city of New Orleans, this 3d day of February, A. D. one thousand eight hundred and seventy-seven, and of the Independence of the United States of America the 101st year.

[SEAL.] (Signed) F. B. VINOT.
By Clerk.

Marshal's return (amended as prayed for).

Received, February 3d, 1877, by the U. S. marshal, and on the
42 sixth day of same month and year served a copy hereof with accompanying supplemental petition on Mrs. B. Fleitas, within named, by handing the same to her in person in the city of New Orleans.

(Signed) S. W. REED,
By U. S. Marshal.

Motion & order to amend marshal's return.—Entered & filed February 17, 1877.

U. S. circuit court, dist. La.

COCKREM & HALSEY, REC'RS, *vs.* WIDOW B. FLEITAS. } No. 8026.

Now comes J. R. G. Pitkin, United States marshal for this district, and suggesting that he has made an error in his return of service of citation herein against Mrs. Widow B. Fleitas on the supplemental petition, and thereupon he prays leave to amend his return.

And it is now ordered that said marshal have leave to amend accordingly.

Entering default on supplemental petition.—Extract from the minutes of February 17, 1877.

COCHREM & HALSEY, REC'RS, *vs.* WIDOW B. FLEITAS. } No. 8026.

43 On motion of Rouse and Grant, of counsel for plaintiffs, and on showing to the court that the defendant has failed to answer the supple-

mental petition, altho' duly cited, ordered that judgment by default be entered against her.

Verdict.—Extract from the minutes of February 23d, 1877.

COCKREM & HALSEY, REC'RS, *vs.* MRS. B. FLEITAS. } No. 8026.

This cause was called for the confirmation of the defaults entered on 26th January and 17th February, 1877—Rouse & Grant & Clarke, Bayne & Renshaw, for pl'ff's, when the following jurors were called and sworn in the premises:

1. Geo. Terry.
2. Ja's Crane.
3. Walter C. Cook.
4. Ja's T. Rodd.
5. Clement Camp.
6. Tho's F. Patton.
7. A. P. Snaer.
8. Geo. H. Frost.
9. Jno. Burns.
10. Paul Bonseigneur.
11. L. Pessou.
12. Aristide Ducongé.

And the jury being complete, the court appointed Tho's F. Pat-
44 ton foreman, and the trial proceeded; and after hearing the pleadings and evidence the cause was submitted to the jury, who returned the following verdict, to wit:

We the jury find a verdict in favor of plaintiffs for five thousand dollars, with interest, as claimed in the petition, and with a privilege on the property attached, and with recourse on the principal and sureties on the bond upon which the property attached was released.

February 23d, 1877.

THO'S F. PATTON, *Foreman.*

Whereupon it is ordered that the same be recorded.

Judgment.—Extract from judgment book.

Circuit court of the United States, fifth circuit and district of Louisiana, November term, 1876.

NEW ORLEANS,
Friday, February 23d, 1877.

Court met pursuant to adjournment.

Present, Hon. E. C. Billings, district judge.

COCHREM & HALSEY, REC'RS, *vs.* WIDOW B. FLEITAS. } No. 8026.
45

By reason of the verdict and in accordance therewith, it is ordered, adjudged, and decreed that the judgments by default taken on the original and supplemental petitions on 26th January and 17th February, 1877, be confirmed, and that the plaintiffs, John Cockrem and William F. Halsey, receivers, appointed in suit 7064 of the docket of this court, do have and recover from the defendant, Widow B. Fleitas, the sum of five thousand dollars with five per cent. per annum interest from 21st December, 1871, till paid, and costs of suit, with privilege upon the property attached, and with recourse on the principal and sureties on the bond upon which the property attached was released.

Judgment rendered February 23, 1877.

Judgment signed February 28, 1877.

(Signed) EDWARD C. BILLINGS, *Judge.*

Petition & order for writ of error.—Filed March 5th, 1877.

U. S. C. C.

COCKREM & HALSEY, REC'RS, }
vs. } No. 8026.
46 MRS. WIDOW B. FLEITAS. }

To the honorable the circuit court of the United States for the fifth circuit, district of Louisiana:

The petition of Mrs. Widow B. Fleitas respectfully represents that in the suit of the above title in this hon. court a judgment was rendered against her on the 23d of February, 1877, and signed on the 28th of said month, for the sum of five thousand dollars and interest at the rate of five per cent. per annum from the 21st of December, 1871.

That she is advised and believes there is plain and manifest error in the said judgment which will work to her irrepa'ble injury unless she be relieved therefrom by writ of error to the Supreme Court of the United States.

That the amount involved is over five thousand dollars.

That she herewith tenders the bond and sureties necessary to entitle her to said bond to operate as a supersedeas.

Wherefore she prays that said bond be accepted, and that a
47 writ of error may be granted, returnable according to law to the Supreme Court of the United States, that the same shall operate as a supersedeas, and for all other relief in the premises, &c., &c.

(Signed) WM. W. KING,
Att'y for Mrs. Fleitas.

Order.

A writ of error, to operate as a supersedeas, is allowed in this case, as prayed for, and, according to law, returnable to the Supreme Court of the United States on the second Monday of October, 1877, the petitioner giving bond in the sum of nine thousand & five hundred dollars, with good and solvent security, conditioned as the law directs.

New Orleans, March 5, 1877.

(Signed) EDWARD C. BILLINGS, *Judge.*

Bond for writ of error.—Filed March 5th, 1877.

UNITED STATES OF AMERICA:

Know all men by these presents that we, Widow Barthelemy Fleitas, and Cyrus Chism and S. H. Boyd, composing the commercial
48 firm of Chism & Boyd, are held and firmly bound, jointly and severally, unto Cockrem & Halsey, receivers, &c., the plaintiffs in the suit against said Mrs. Fleitas, in United States circuit court, fifth judicial circuit, district of Louisiana, by said Halsey & Cockrem, in the sum of nine thousand five hundred dollars, lawful money of the United States of America, to be paid to the said Cockrem & Halsey, their successors, or heirs, executors, administrators, and assigns, for which payment, well and truly to be made, we bind ourselves and each of us, by himself and each of our heirs, executors, and administrators, firmly by these presents, sealed with our seals, and dated the fifth day of March, in the year of our Lord eighteen hundred and seventy-seven.

Whereas the said Mrs. Widow B. Fleitas has this day presented a petition to the honorable the circuit court of the United States for the fifth circuit, holding sessions in and for the district of Louisiana, praying for a writ of error from a judgment rendered in the United States circuit

court for the fifth judicial circuit, district of Louisiana, on the
49 23d of Feb., 1877, and signed the 28th of the same month, against her and in favor of said Cockrem and Halsey:

Now, the condition of the above obligation is, that we, the above bounden Mrs. Widow B. Fleitas and Chism & Boyd, will well and truly pay to the said Cockrem and Halsey all such damages costs as they may recover against us, in case it should be decided that the said writ of error was wrongfully obtained.

(Signed) WIDOW B. FLEITAS. [L. S.]
" CHISM & BOYD, [L. S.]
Pr. F. H. BOYD, [L. S.]
Of the Firm.

Signed, sealed, & delivered in the presence of—
(Signed) WM. W. KING,
Att'y at Law.

Approved.
(Signed) EDWARD C. BILLINGS, *Judge.*

Motion & order to file additional bond.—Entered & filed March 25th, 1877.

U. S. C. C.

COCKREM & HALSEY, REC'RS,
vs.
MRS. W'DOW B. FLEITAS.

On motion of W. W. King, of counsel for defendant, upon sug-
50 gesting to the court that there is some apprehension that the bond heretofore filed for the writ of error & supersedeas may be objected to on account of its form, in order to obviate any such objection, if there be ground for one, and upon further suggesting to the court that the defendant is still within the delay allowed by law for filing a bond which will operate as a supersedeas, it is ordered by the court that the defendant have leave to file the additional bond herewith exhibited, and that the same be approved.

Additional bond.—Filed March 29th.

Know all men by these presents that we, Mrs. Widow B. Fleitas, as principal, and Cyrus Chism & S. H. Boyd, composing the commercial firm of Chism & Boyd, as sureties, are held and firmly bound unto W. F. Halsey and John Cockrem, &c., &c., in the full and just sum of nine thousand five hundred dollars, to be paid to the said Halsey & Cockrem, their successors, certain attorneys, executors, administrators, or
51 assigns, to which payment, well and truly to be made, we, bing ourselves, our heirs, executors, and administrators, jointly and severally, by these presents, sealed with our seals, and dated this 29th day of March, in the year of our Lord one thousand eight hundred and seventy-seven.

Whereas lately, at a circuit court of the United States, fifth judicial circuit, holding sessions in and for the district of Louisiana, to wit, rendered on the 23d of Feb., 1877, and signed 28th Feb., 1877, in a suit depending in said circuit court, wherein said Cockrem and Halsey are plaintiffs and said Mrs. Fleitas defendant, judgment was rendered against the said Mrs. Fleitas, defendant, and the said Mrs. Fleitas having obtained a writ of error and filed a copy thereof in the clerk's office of the said circuit court to reverse the judgment in the aforesaid suit, and a citation directed to the said Cockrem & Halsey, citing and admonishing them to be and appear at a Supreme Court of the United

States to be holden at Washington the second Monday of October next:

52 Now the condition of the above obligation is such that if the said Mrs. Fleitas shall prosecute her writ to effect and answer all damages and costs if she fails to make her plea good, then the above obligation to be void, else to remain in full force and virtue.

(Signed) WIDOW B. FLEITAS, [L. S.]
(") P'r W. W. KING.
(") CHISM & BOYD, [L. S.]
By F. H. BOYD. [L. S.]

Sealed & delivered in the presence of—
(Signed) WM. W. KING.

Bond approved.
(Signed) EDWARD C. BILLINGS, *Judge.*

53 UNITED STATES OF AMERICA:

Circuit court of the United States, fifth circuit and district of Louisiana.

CLERK'S OFFICE.

I, Francis A. Woolfley, clerk of the circuit court of the United States for the fifth circuit and district of Louisiana, do hereby certify that the foregoing 54 pages contain and form a full, complete, true, and perfect transcript of the record and proceedings had on the trial of the case of John Cockrem & Wm. F. Halsey, rec'rs, vs. Widow B. Fleitas, No. 8026 of the docket, so far as the same now remain of record or on file in said court.

Witness my hand and the seal of said court, at the city of New Orleans, this 31st day of July, A. D. 1877.

[SEAL.] F. A. WOOLFLEY, *Clerk.*

I, Edward C. Billings, United States judge for the district of Louisiana, do certify that Francis A. Woolfley, whose name is signed to the above certificate as clerk of the circuit court of the United States for the fifth circuit and district of Louisiana, was, at the time of signing said certificate, and is now, the clerk of said court; that said certificate is in due form of law, and that full faith and credit are due to his official attestations as such clerk.

Given under my hand at the city of New Orleans, in said district, this 31st day of July, A. D. 1877.

EDWARD C. BILLINGS, *Judge.*

54 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States in and for the fifth circuit, and holding sessions for the district of Louisiana, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, or some of you, between John Cockrem and William F. Halsey, receivers of the New Orleans National Banking Association, duly appointed in the suit No. 7064 in said court, and Mrs. Widow B. Fleitas, a manifest error hath happened, to the great damage of the said Mrs. Widow B. Fleitas, as by her complaint appears, we being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so

that you have the same at Washington, on the second Monday of October next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right, and according to the laws and customs of the United States, should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, this 15th day of March, in the year of our Lord one thousand eight hundred and seventy-seven.

[SEAL.] F. A. WOOLFLEY,
Clerk of the United States Circuit Court for the District of Louisiana.

(Indorsed:) United States circuit court. No. 8026. Mrs. Wow B. Fleitas, plaintiff in error, versus John Cockrem & Wm. F. Halsey, receivers, &c., defendants in error. Writ of error.

55 THE UNITED STATES OF AMERICA:

Circuit court of the United States, district of Louisiana.

The President of the United States to John Cockrem and William F. Halsey, receivers of the New Orleans National Banking Association, duly appointed in the suit No. 7064 in said court, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at the city of Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the fifth circuit and district of Louisiana, wherein Mrs. Widow B. Fleitas is plaintiff in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said Mrs. Widow B. Fleitas, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 6th day of March, in the year of our Lord one thousand eight hundred and seventy-seven.

EDWARD C. BILLINGS, *Judge.*

56 (Indorsed:) United States circuit court. No. 8026. Mrs. Widow B. Fleitas, plaintiff in error, vs. John Cockrem & Wm. F. Halsey, receivers, &c., defendants in error. Citation.

Marshal's return.

Received Mar. 12, 1877, by the U. S. marshal, and on the 13th day of March, 1877, served a copy hereof on John Cockrem & William F. Halsey, receivers, by handing the same to J. D. Rouse, esq., attorney for said receivers, in person, in the city of New Orleans.

S. W. REED,
Dy Marshal.

(Indorsement on cover:) No. 186. Mrs. Widow B. Fleitas, plaintiff in error, vs. John Cockrem and William F. Halsey, receivers of the New Orleans National Banking Association. Louisiana C. C. U. S. Filed 26th September, 1877.

Supreme Court of the United States

OCTOBER TERM, 1879.

No. 186.

Mrs. WIDOW B. FLEITAS,

Plaintiff in Error,

vs.

COCKREM & HALSEY, Receivers, &c.,

Defendants in Error.

ERROR TO THE UNITED STATES CIRCUIT COURT, FIFTH CIRCUIT, DISTRICT OF LOUISIANA.

BRIEF FOR PLAINTIFF IN ERROR,

By CHARLES CASE,

Of Counsel.

Thomas McGill & Co., Law Printers, Washington, D. C.

Supreme Court of the United States.

OCTOBER TERM, 1879.

No. 186.

MRS. WIDOW B. FLEITAS, PLAINTIFF IN ERROR,

vs.

COCKREM & HALSEY, RECEIVERS, &c., DEFENDANTS IN ERROR.

ERROR TO THE U. S. CIRCUIT COURT, FIFTH CIRCUIT, DISTRICT OF LOUISIANA.

BRIEF FOR PLAINTIFF IN ERROR, BY CHARLES CASE, OF COUNSEL.

Local counsel have filed a brief for plaintiff in error; and, therefore, this may be a work of supererogation. On the other hand, possibly it may supply a need, and aid both client and court. In this hope it is submitted.

I.

STATEMENT OF FACTS.

1st. On December 14, 1876, Cockrem & Halsey, as receivers, &c., of New Orleans, Louisiana, commenced suit against said plaintiff in error, a citizen of Mississippi, but then temporarily visiting in New Orleans, in said Circuit

Court of the United States, upon a note, which, for purposes of identity hereafter material, is here copied, as follows:

"$5,000.$^{00}_{}$ NEW ORLEANS, *Sept.* 14, 1871.

"Ninety-five days after date I promise to pay to the order of F. B. Fleitas five thousand $\frac{00}{100}$ dollars, at the New Orleans Banking Ass'n, value received.

(Signed,) "V'VE B'MY FLEITAS."

Said note was indorsed in blank "F. B. FLEITAS;" also indorsed: "I hereby waive protest and demand of protest, and hold myself responsible on this note as if legally protested. Dec. 21, '71. F. B. FLEITAS."

Said suit was numbered in said Circuit Court 8026, and citation was served on said plaintiff in error December 15, 1876. (Record, pp. 1, 2.)

2d. In due time the plaintiff in error, by her attorney, William W. King, Esq., appeared to said suit, and filed what may be termed by the Code of Practice of Louisiana an "EXCEPTION," setting up "*lis pendens*." (Record, p. 2.) In other words, she, by her attorney, pleaded in abatement of said suit 8026 the pendency of another and prior action by the same plaintiffs against the same defendant, and for the same cause, to wit, the said note above set forth. Said exception set forth that said prior action so pleaded in abatement was commenced in the Sixth District Court for the parish of Orleans, November 10, 1876; that on December 5, 1876, said plaintiff in error, upon proper proceedings had and bond filed, prayed said District Court that said prior cause might be removed to said U. S. Circuit Court; that on said 5th December, 1876, said District Court ordered said prior cause to be removed, and the same was removed, in conformity to law, to said U. S. Circuit Court, where the same was duly pending when said cause No. 8026 was commenced, as well as when said exception was filed.

With said exception was filed an authentic transcript of said cause so commenced in said District Court, and therefrom removed as aforesaid, which transcript demonstrated that said last-mentioned suit was between the same parties and founded upon the same cause of action, to wit, said promissory note, as said suit No. 8026. (Record, pp. 3–6.)

3d. The filing of said exception made up an issue of fact, the exact questions involved being: 1st. Was said suit so brought in said District Court and therefrom removed to said Circuit Court commenced prior to said suit No. 8026, and was said first-mentioned suit still pending? and 2d. Were the parties and cause of action in both suits the same?

Upon the questions thus put in issue the record (p. 6) shows the following entry of a trial, viz.:

"No. 8026, &c. Wednesday, January 3, 1877.

"The exception in this cause was called for trial by the court, *the jury having been waived in writing;* Rouse and Grant, for plaintiffs; W. W. King, for exceptor; and after hearing the pleadings and argument, the court took time to advise."

In connection with this record entry of the trial, attention is invited to one of many singular peculiarities of this brief case. The record contains no copy of any writing waiving a jury. It does not say that any such writing was "filed with the clerk." All that is said about it is as laconic as possible, while in the appendix to the brief filed by Messrs. King & Mott (*quod, vide* pp. 6–8) is a supplemental record in this cause, setting up that the said exceptor did *not* waive, but insisted upon a trial by jury. As to this, more hereafter.

4th. Six days after said trial (January 9, 1877) said Circuit Court rendered the following judgment in said cause 8026, to wit:

"Upon due consideration of the plea of *lis pendens*, the

court, for reasons assigned in writing, orders that the plaintiffs may elect to proceed in this case upon paying the costs in the *first;* and if he does [they do?] so elect within the period of ten days, and does discontinue *the first cause* and pay the costs therein, *the court will overrule the plea; otherwise, maintain it!*" (Record, p. 7.)

5th. The next day (January 10) said Circuit Court made an order *in said suit* 8026, setting forth that said Cockrem & Halsey did then elect to discontinue said cause so removed from said District Court, and said order concluded as follows, viz.:

"And thereupon the court considering said election, and it appearing that the costs of said suit [which suit?] have all been paid by plaintiffs as per receipts on file, on motion of Rouse & Grant, attorneys for plaintiffs, it is ordered that said suit so removed from said Sixth District Court be, and the same is hereby, discontinued at said plaintiffs' costs; *and it is further ordered that said exception herein filed by said defendant be dismissed.*" (Record, p. 7.)

6th. On the same day, on application of plaintiffs below, said Circuit Court ordered that upon their giving bond in the sum of $3,200 an attachment should issue against the property, rights, &c., of said plaintiff in error; such bond was filed, said attachment thereupon issued, and by virtue of it, on the 18th day of January, 1877, the marshal attached "the Corrinne plantation," sugar-house and contents, viz., some sugar, &c., (Record, pp. 7–9,) which said attached property said marshal immediately released and redelivered to said plaintiff in error upon her giving bond in the sum of $9,100, with F. H. Boyd and Cyrus Chism as sureties. This bond was duly assigned to plaintiffs below. (Record, pp. 9, 10.) The said attachment bond of said Cockrem & Halsey, receivers, &c., was only signed by them as such receivers, *and by said Halsey as sole surety.* (Record, p. 9.)

7th. January 13, 1877, plaintiff in error took a rule on

said plaintiffs below, to show cause on the 20th instant why said attachment should not be set aside and dismissed, assigning in substance as two reasons, first, that said attachment bond was insufficient in amount; second, that there was no sufficient surety to said bond. (Record, p. 11.) A prior rule is here passed over. January 20 said rule was heard by court, taken under advisement, and on the 23d January the same was dismissed. (Record, p. 11.)

Here follow two bills of exception, the last of which excepts to the decision of the court below dismissing the rule taken to dismiss said attachment. According to the views of the writer, it is unnecessary to epitomize either of them.

8th. January 26, 1877, judgment was entered against said plaintiff in error by default, (Record, p. 12,) and on February 17 default was entered on the supplementary (attachment) petition. (Record, pp. 15, 16.)

February 23 the cause was called for confirmation of said default, a jury was impanelled, who returned the following verdict, to wit:

"We, the jury, find a verdict in favor of plaintiffs for five thousand dollars, with interest as claimed in the petition, and *with a privilege on the property attached, and with recourse on the principal and sureties on the bond upon which the property attached was released!*" (Record, p. 16.)

(The verdict did *not* order the court to issue execution!)

9th. Same day (February 23) said Circuit Court rendered the following final judgment:

"COCKREM & HALSEY, Receivers,
vs.
WIDOW B. FLEITAS. } No. 8026.

By reason of the verdict, and in accordance therewith, it is ordered, adjudged, and decreed that the judgments by default taken on the original and supplemental petitions on the 26th January and 17th February, 1877, be confirmed;

and that the plaintiffs, John Cockrem and William F. Halsey, receivers appointed in suit 7064 of the docket of this court, do have and recover from the defendant, Widow B. Fleitas, the sum of $5,000, with 5 per cent. per annum interest from 21st December, 1871, till paid, and costs of suit, *with privilege upon the property attached, and with recourse on the principal and sureties on the bond upon which the property attached was released.*" (Record, p. 16.)

II.

Assignment of Errors.

Upon the record showing the foregoing facts, the following errors are assigned, to wit:

First. Said Circuit Court erred in assuming to try and in trying the questions of fact raised by said exception of *lis pendens*, instead of submitting said questions for trial and determination to a jury.

Second. Said court erred in giving to said defendants in error the opportunity to elect whether they would, within a time limited, discontinue said suit first brought, paying costs of same, &c.

Third. Said court erred in dismissing said exception, and in retaining said cause No. 8026 for trial on the merits. Said exception should have been sustained, and said last-named cause thereupon dismissed.

Fourth. Said court erred in ordering a writ of attachment in favor of said defendants in error, for two reasons: 1st. Because said bond tendered and filed by said defendants in error was for an insufficient amount; 2d. Because there was no sufficient surety upon said bond.

Fifth. Said court erred in dismissing the said rule taken by said plaintiff in error to set aside and dismiss said writ of attachment. Said rule should have been made absolute.

Sixth. Said court erred in rendering a final judgment in favor of said defendants in error, (plaintiffs below,) giving them a privilege upon the property attached.

Seventh. Said court erred in rendering a final judgment in said cause which gave to said defendants in error recourse against the principal and sureties upon said bond upon which said attached property was released.

III.

Argument.

The points made and authorities cited by Messrs. King & Mott in their brief render extended additional argument unimportant. The writer will therefore be literally brief.

1st. The first error relates to the mode of trial of the exception of *lis pendens*. That exception raised questions of fact. True, the record of the suit commenced in the Sixth District Court (which we will call the first suit) proved most of them either conclusively or presumptively; but there were still the questions of identity as to parties and cause of action, to wit: Were the parties in both suits the same? And was the note sued on in said first suit the same as that sued for in this cause? Or was it another of same date, tenor, and amount?

Simple as these issues of fact were, there was but one legal mode (unless legally waived) of determining them in a Federal court, to wit, by verdict of a jury. Was that legal mode legally waived?

Aside from the assertions of the supplemental record, which cannot be considered here, and as to the printing of which we conclude to say nothing, it is submitted that the record does not show such a waiver as the law (U. S. Rev. Stats., sec. 649) requires.

It is well suggested in the brief of associate counsel that the statement of the record might be true, though there

was in fact only a written waiver signed alone by plaintiffs below, or their counsel. We add, it does not appear that any waiver was *filed* with the clerk; and the fact that a copy of it should have appeared as part of the record, if so filed, creates at least a suspicion that the statutory requirement in this regard was neglected. If this court would hold that such written waiver must, in its words, be copied into the final record, it would remedy all such embarrassments as the present, while carrying out the true spirit of the statute.

Claiming that no sufficient waiver appears, we hold that the trial of said exception by the court was error. ✳

See annexed note

2d. The second and third errors assigned may be discussed together; and we remark that the court below certainly found that the averments of the exception were true. The language of the judge in his order, in which he speaks of "*said first suit*," giving plaintiffs below an election to discontinue said *first suit* and pay the costs *thereof* within ten days, &c., leaves no room for a doubt on this point. Such, beyond all room for cavil, having been the finding of fact by the judge below, we ask, Where did said judge find authority for avoiding the positive requirements of both code and common law, and granting to plaintiffs below the privilege of discontinuing the first suit, &c.? We ask this in all seriousness; for, so far as known to the writer, the honorable judge had no more right to make such an order than he had to order the defendant below to elect whether she would withdraw her exception or stand committed for contempt of court!

Finding the exception true, or upon the hypothesis that its averments were true, the court below had but one straight, plain, legal path to pursue, viz., *to give judgment dismissing this suit.*

This proposition would seem incontrovertible from the provisions of the Louisiana Code of Practice quoted in the

* Since this brief was put in type Associate counsel has recalled the writer's attention to the last clause of Section 3. of Act of March 3. 1875 (U. S. Statutes 2nd Sess. 43d Congress p. 471); and after careful examination the conclusion seems unavoidable that this clause repealed the former law authorizing written waiver of a jury. No proviso saving this right, no later legislation restoring it, has been discovered. Taking this view of the matter law, this cause should be reversed, and a venire de novo awarded, on the authority of Graham v Bayne 18 How. 60, and kindred decisions. The Statute makes no exceptions; "issues of fact" whether pertaining to the merits, or, to matter in abatement, must be tried by a jury

ed for the occasion. [illegible]
made in this instance. The defendant below had gone to

provisions of the Louisiana Code of Practice quoted in the

brief of associate counsel, (*quod, vide* pp. 2 and 3,) and we shall not enlarge. The code confers no discretion upon the court, and it was bold, bald error for the court to exercise any.

We have said the common-law rule is the same, and we cite one decision, not only because it proves this assertion, but because it illustrates what is the duty of the court when it is proposed to evade or avoid the technical effect of the plea by methods not sanctioned by law. It is the case of *Frog's Exrs.* v. *Long's Admr.*, 3 Dana, (Ky.,) 157.

The plaintiffs, as executors, sued the administrator of Long upon a contract made in Long's life-time. Defendant pleaded in abatement another prior suit brought for same cause of action and still pending. Plaintiffs replied that subsequent to the filing of said plea *they had discontinued the prior action, &c.* The court below sustained the plea notwithstanding the replication, and dismissed the second suit at the costs, *personally*, of plaintiffs. On appeal the higher court said: "It is well settled that if the plea of a prior action pending for same cause be pleaded, *and be true at the time when filed*, it cannot be defeated by the subsequent discontinuance of the prior action. The judgment below in this regard was held right, though reversed, solely on the ground that, as plaintiffs had acted in good faith, they should not have been held *personally* liable for the costs.

Perhaps no decision can be found more forcibly illustrating what the court below should have done in the case at bar; for no reason is apparent why the Louisiana code should not be held to prescribe an equally rigid practice. If the law imposes technical rules, they usually serve a wise purpose; and even when they seem to stand as impediments to right, it is not far removed from usurpation for the judge to assume to avoid them by a practice invented for the occasion. Nor was there any equity in the order made in this instance. The defendant below had gone to

the trouble and expense of employing counsel to prepare for her a formal petition and bond for removing said first suit to the Federal court. She had furnished her sureties, her counsel had for her obtained the order of removal, and it was her right thereupon to have her liability upon said note (if any) adjudicated in said first suit, or, at least, to be annoyed with no other, for same cause, while that was pending.

If this theory is correct, counsel for defendant below was right in not thereafter appearing to the merits in the second suit. It should have been dismissed; and this error, we confidently submit, should reverse this case.

3d. The fourth and fifth errors may also be considered together, and, as we confidently believe, show that said writ of attachment was illegally issued, and should have been dismissed on hearing of the rule taken for that purpose. The amount sued for was $5,000 and interest for several years. The bond given for the allowance of the writ of attachment was in the sum of $3,200 only, and one of the plaintiffs below *was the sole surety.* We quote the article of the Code of Practice of Louisiana which governs, to wit:

"ART. 245. A creditor, his agent, or attorney in fact, praying such attachment, must, besides, annex to his petition his obligation in favor of the defendant for a sum exceeding one-half that which he claims, with the surety of one good and solvent person residing within the jurisdiction of the court to which the petition is presented, as a security for the payment of such damages as such defendant may recover against him in case it should be decided that the attachment was wrongfully obtained."

Little can be added to the argument of associate counsel as to the true meaning of the above article. They well say the bond should have been for over $8,000, and they truth-

fully assert that the point "has been settled in their (Louisiana) jurisprudence by numerous decisions running through a half century." (See their brief, p. 4, and the cases there cited.) These decisions sustain fully their theory as to the amount of the bond, and many more could have been cited.

Equally clear, to our mind, is the proposition that it was neither a compliance with the spirit of article 245 nor the exercise of a sound legal discretion on the part of the court below to accept one of the plaintiffs in that court, in his individual capacity, as the *sole* surety on the bond. True, the article requires but one; and we use the phrase "*sole* surety," because if there had been another besides one of said plaintiffs, the bond would, in that respect, have been good. As accepted, we cannot, as at present advised, believe it filled the requirements of the law.

4th. The sixth and seventh errors assigned relate to the final judgment,—a judgment which we must regard as most extraordinary even in the annals of Louisiana practice in Federal tribunals.

Some provisions of the Code of Practice of Louisiana must here be quoted, viz.:

"ART. 259 [first paragraph]. The defendant, if he appear either in person or by his advocate, may, moreover, in every stage of the suit, have the property attached *released*, by delivering to the sheriff (marshal) his obligation for the sum exceeding by one-half the value of the property attached, with the surety of a good and solvent person residing within the jurisdiction of the court where the action was brought, that he will satisfy such judgment, to the value of the property attached, as may be rendered against him in the suit pending."

PARAGRAPH 2 of same article (259) enacts that "the said act of surety shall be assigned by the sheriff to the plaintiff."

Paragraph 3 and last of said article reads thus:

"And when the defendant fails to satisfy the judgment

rendered against him, the plaintiff may, *on the return of the sheriff that no property has been found*, and on exhibiting to the court said obligation duly transferred to him, obtain judgment against the surety on said obligation, *upon motion, after ten days' previous notice to said surety*, which *motion* shall be tried summarily, and without the intervention of a jury, unless the said surety shall allege under oath that the signature to the bond purporting to be his is not genuine, or that judgment has been satisfied."

In view of these unequivocal provisions of the code, is a word of comment necessary? The record shows that the marshal had taken bond with surety from the defendant below (plaintiff in error) that he had thereupon released and redelivered the property attached to her, and had assigned said bond to plaintiffs below. How could the court then render the judgment for a privilege, as it did? The property was no longer *custodiam legis*. As well might the court have assumed to give the plaintiffs a privilege on the New Orleans custom-house!

We refer this court to the decisions cited in brief of associate counsel, (*quod, vide* p. 5,) and have nothing to add upon this point.

But the final judgment assumes to fix the liability of the sureties on the bond given for release of the attached property. The provision of the code last quoted shows that this was error. Before they could be made liable there must have been a return of *nulla bona* on execution issued against the principal of the bond. Then a motion was essential, and said sureties were entitled to their "day in court" after ten days' notice. Surely no additional word is necessary.

We are aware that the errors from fourth to seventh inclusive may not show cause for an entire reversal of the judgment below, though that may be the only legal course to adopt, and at all events we submit that the first, second, and third errors assigned must reverse the case entirely; and, technical though they appear, it is but just and wise in the present case to give to them full legal effect.

We submit this brief, curious to know how the able and astute counsel for defendants in error will attempt to get over obstacles to our mind insurmountable. We know their shrewdness and attainments; but we know, too, or at least have memories of, what has been done even in Federal tribunals in Louisiana, and these memories are not all pleasant. In view of them and of the case at bar, a lesson from this high tribunal teaching that courts must administer, not make law, will have no harmful influence.

CHARLES CASE,
Of Counsel for Plaintiff in Error.

SUPREME COURT OF THE UNITED STATES.

No. 186.

MRS. WIDOW B. FLEITAS, PLAINTIFF IN ERROR,

versus

COCKREM & HAILSEY, RECEIVERS, ETC.

Brief and Assignment of Errors in Behalf of Mrs. Fleitas, Plaintiff in Error.

WM. W. KING,
ROBT. MOTT,
For Plaintiff in Error.

A W Hyatt, Print, 38 Camp St, N O—15,298

SUPREME COURT OF THE UNITED STATES.

No. 186.

MRS. WIDOW B. FLEITAS, PLAINTIFF IN ERROR,

versus

COCKREM & HALSEY, RECEIVERS, ETC.

Brief and Assignment of Errors in Behalf of Mrs. Fleitas, Plaintiff in Error.

I.

To this suit Mrs. Fleitas filed an exception. See printed Record, p. 2.

The exception tendered an issue of fact which should have been tried by a jury. The case was tried without a jury, and without a waiver of jury in writing, by the attorneys or parties to the suit. Rev. Stat. U. S., Secs. 648, 649.

A complete transcript was made by the clerk of the Circuit Court, which is on file in the case. See original record, and clerk's certificate. There is not in it a written waiver of jury, as the law requires.

It is true, the Record contains an entry on the minutes to this effect:

"The Exception in this cause was called for trial by the Court, the jury having *been waived in writing*."

It is submitted this entry by the clerk does not meet the requirements of the law. "Issues of fact in civil cases in any

Circuit Court, may be tried by the Court, without the intervention of a jury, whenever the *parties*, or their attorneys of record, *file* with the clerk a stipulation in writing waiving a jury" Rev. Stat., Sec. 649.

The language of the Clerk might have been true, if the plaintiff alone had filed in writing a waiver of jury. The absence in the Record of any such written stipulation of both parties cannot be dispensed with by the ambiguous entry made by the Clerk.

In this connection, we refer to an unsuccessful effort made to have the entry of the Clerk corrected, copies of which will be found printed as an appendix to this Brief. The original has been sent to the Clerk of the Supreme Court.

It would seem hard on Mrs. Fleitas if there be no means of correcting the error of the Clerk of the Circuit Court.

We ask the Court to give to the proceedings such consideration as they may deserve.

II.

On the trial of the Exception the Court, without making any statement of facts, gave judgment allowing the plaintiff ten days within which to elect, which of the two suits they would prosecute, and if the first cause was then discontinued and costs paid, the exception was over-ruled. Rec. p. 7.

The case was one on the law side of the Court, and should have been governed by the law. The plaintiffs had no right to ask the privilege of an election, and the Court could not legally grant it.

Article 335, of the La. Code of Practice provides—

"There are two kinds of declinatory exceptions:

"1st. When the exception is taken to the competency of the judge, pursuant to the rules above provided.

"2d. When it arises from the fact of another suit being pending,

between the same parties, for the same object and growing out of the same cause of action, before another Court of concurrent jurisdiction. In both cases the suit must *be dismissed* and the plaintiff decreed to pay the costs."

Art. 491—"The plaintiff in every stage of the suit, previous to judgment being rendered, may discontinue the suit on payment of costs."

Art. 492—"After discontinuing the suit, the plaintiff may bring the action anew, provided he has paid the costs of the first suit."

These provisions of the law seem plain enough, and they are peremptory. "A second suit brought for the same cause of action, before the discontinuance of the first and payment of costs, *must be dismissed*."

These articles of the Code of Practice have been applied and enforced in numerous cases by the Courts of Louisiana.

See Hennen's Digest, verbo pleading, division Plea of *lis pendens*, p. 1166.

The second suit should have been dismissed by the Court.

III.

After the rendition of the foregoing judgment the counsel for plaintiffs, upon an ex parte motion, obtained an order dismissing the exception, without any legal evidence that the costs of the first suit had been paid. Rec. p. 7.

The evidence adduced were receeipts without any proof of their genuineness.

Counsel for Mrs. Fleitas took a Rule to vacate the order. Rec. pp. 10 and 11.

See Bill of Exceptions, Rec. pp. 12 and 13.

IV.

The first suit has never been discontinued. It still stands on the Docket of the Court as when originally brought.

The motion to discontinue could not be made in the second suit. It should have been made and entered in the first suit.

V.

The plaintiffs proceeded, after defendants Exception had been over-ruled, to take judgment by default.

Judgment was rendered against the defendant for the amount claimed in the petition, "with privilege upon the property attached, and with recourse on the principal and sureties on the bond upon which the property attached had been released." Rec. p. 16.

The Attachment was illegally issued. Defendants counsel took a rule to set the same aside upon grounds stated. Rec. p. 11.

1st. The bond given by the plaintiffs for the issuing of the attachment was insufficient in amount. The suit was for $5000, with interest, etc. The bond given was only for the sum of $3200 00. Rec. p. 8. The law required a bond for one-half over the amount sued for. The interest should have been added to the $5000, and then a bond given for a sum exceeding that aggregate by one-half. The bond should have been given for over $8000 00.

This question has been settled in our jurisprudence, by numerous decisions running through a half century.

Williams vs. Barrow, 3d Louisiana Rep. 58.

This case settled the construction of the law and has been followed ever since.

Pope vs. Hunter, 13th L. R. 308.

Jackson vs. Warwick, 17th L. R. 406.

Fellows vs. Dickens, 5th La. Annual R. 131.

Miller vs. Chandler, 29th La. Annual R. 90.

An illegal attachment could confer no privilege, and all subsequent proceedings based on it, fell to the ground.

2d. The surety on the Bond was insufficient. The Receivers in their individual capacity could not be sureties for their acts in their official capacity.

If the attachment was wrongfully and illegally issued, they

were responsible in their individual capacity alone, for the estate they represent could not be held liable for the consequences of their illegal acts. They were, then, in reality, but sureties for themselves.

3d. The judgment gave a privilege on the property attached. A sugar plantation with all its appurtenances had been attached. The property attached had been released on Bond given by defendant. See Marshal's return, Rec. p. 9. Bond given, p. 10.

There could be no privilege upon property which had been released from the attachment by Bond.

McRae, Coffman & Co. vs. Austin, 9th La. Ann. R. pp. 360 and 361.

Beal vs. Alexander, 1 Rob. La. R. 277.

Dorr vs. Kershaw, 18th La. 57.

Benton vs. Alexander, 2 La. Ann. R. 243.

4th. The sureties on the Bond setting aside the attachment, could not have a judgment rendered against them, without notice, and when no proceedings had been taken to authorize a judgment against them.

5th. The Circuit Court could not, on the law side of the Court, entertain jurisdiction on the question of liens and privileges.

It is submitted that, on account of the errors above set forth, the judgment of the Circuit Court should be reversed.

WM. W. KING,

ROBT. MOTT,

For Plaintiff in Error.

APPENDIX.

COCKREM & HALSEY, RECEIVERS, *versus* MRS. WIDOW B. FLEITAS. } U. S. CIRCUIT COURT, No. 8026.

Be it remembered, that on Monday, the 27th of August, at a Special Term of the said Court, the counsel for the defendant presented the annexed motion and affidavit to the Court, asking upon the grounds therein stated for the correction of an error of the clerk in an entry on the minutes of said Court.

The Court refused to entertain the motion, upon the ground that a writ of error had been taken to the Supreme Court of the United States, and that the Circuit Court had no longer any jurisdiction of any rule or order in the case.

To which ruling of the Court the counsel for defendant excepted, and tendered this bill of exceptions, which he prays may be duly signed.

Which is done accordingly.

(Signed) EDWARD C. BILLINGS,
Judge.

August 28th, 1877.

CLERK'S OFFICE.

A true copy of the original, filed in this office August 28th, 1877.

New Orleans, August 28th, 1877.

F. B. VINOT,
Deputy Clerk.

COCKREM & HALSEY, RECEIVERS, ETC, *versus* WIDOW B. FLEITAS. } U. S. CIRCUIT COURT, No. 8206.

On motion of W. W. King, of Counsel for defendant, upon suggesting to the Court that on the 3d of January, 1877, the

Clerk of the Court made an erroneous entry on the minutes, relative to the waiver of a Jury in the case on the trial of the plea of "*lis pendens*," in the manner stated in the affidavit of W. W. King, herewith filed.

It is ordered by the Court that plaintiffs show cause, if any they have, on the ——— day of ———, why the said entry on the minutes should not be changed so as to conform to the facts of the case.

CLERK'S OFFICE.

A true copy of the original, filed in this office August 27th, 1877.

New Orleans, August 28th, 1877.

F. B. VINOT,
Deputy Clerk.

COCKREM & HALSEY, RECEIVERS,
versus
MRS. WIDOW B. FLEITAS.

U. S. CIRCUIT COURT.
No. 8026.

W. W. King, being duly sworn, states, The following entry appears on the minutes of the Court on Wednesday, January 3d, 1877.

"The exception in this cause was called for trial by the Court, the Jury having been waived in writing."

This entry of a waiver of a Jury is entirely erroneous. There never was any waiver of a jury, either orally or in writing. The facts are these:

After the case was called up for trial on the plea of "*lis pendens*," his Honor, E. C. Billings, who sat as sole Judge in the cause, inquired of Mr. Rouse, Counsel for the plaintiff, whether he had not better have a Jury? To which inquiry, I, as Counsel for defendant, responded that I wanted a Jury. Mr. Rouse replied that he did not think a Jury necessary, and that he would take

the responsibility of trying it without a Jury. Thereupon, the trial proceeded.

This is the first opportunity since the error was discovered to correct it.

(Signed) WM. W. KING.

Sworn to and subscribed before me, in open Court, August 28th, 1877.

(Signed) K. LOEW.

Commissioner Circuit Court Louisiana.

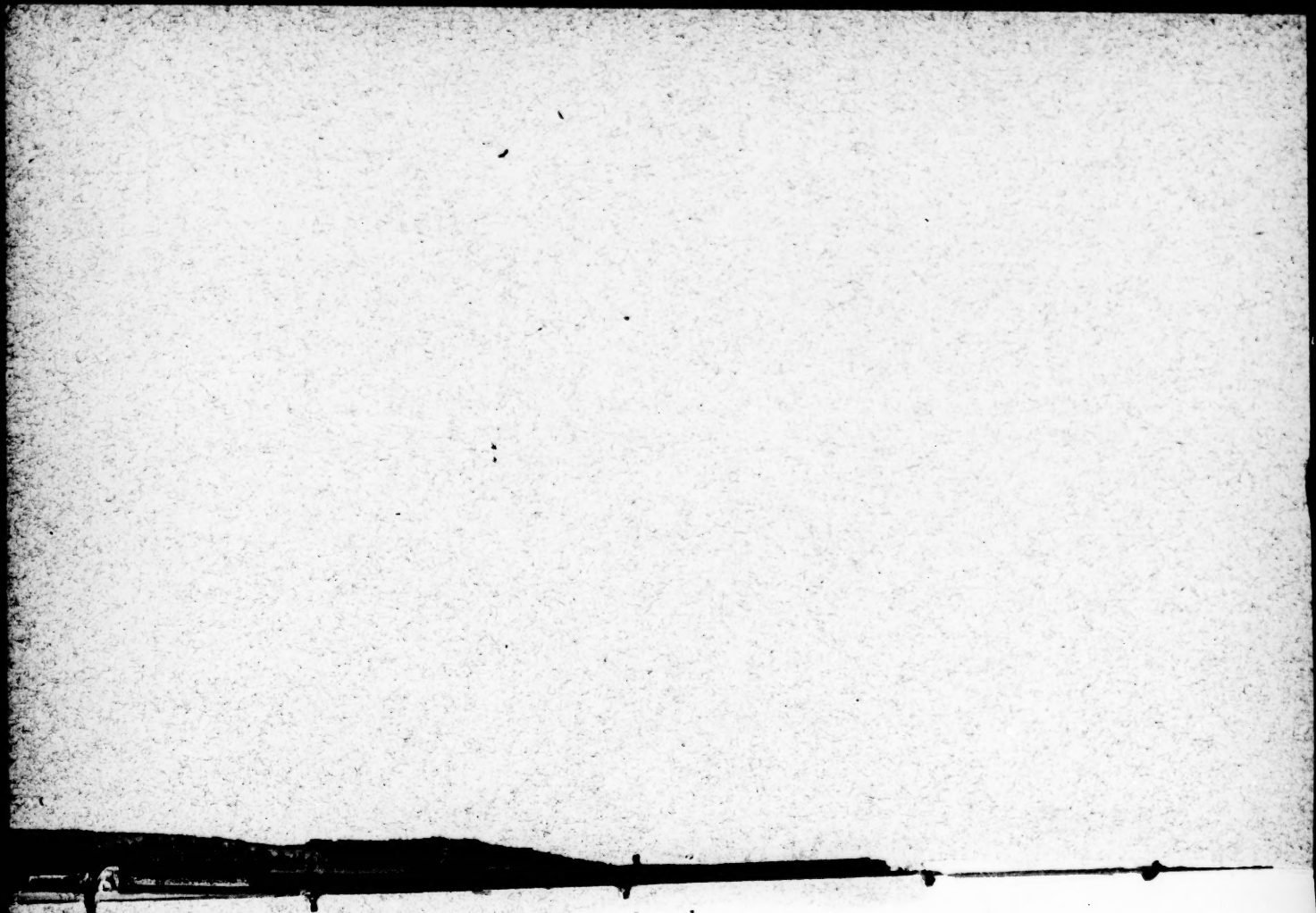
CLERK'S OFFICE.

A true copy of the original, filed in this office August 27th, 1877.

New Orleans, August 28th, 1877.

F. B. VINOT,

Deputy Clerk.



Supreme Court of the United States.

OCTOBER TERM, 1879.

No. 186.

WIDOW B. FLEITAS, PLAINTIFF IN ERROR,

versus

JOHN COCKREM, ET AL., RECEIVERS, ETC.

DEFENDANTS IN ERROR.

Brief for Defendants in Error.

J. D. ROUSE,
WM. GRANT,
Attorneys.

Clark & Hofeline, Brief Printers, 112 Gravier Street.

Supreme Court of the United States.

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WIDOW B. FLEITAS, PLAINTIFF IN ERROR,

versus

JOHN COCKREM, ET AL., RECEIVERS, ETC.

DEFENDANTS IN ERROR.

Brief for Defendants in Error.

We might well presume that the plaintiff in error, having failed to set out separately and specifically the errors asserted and intended to be urged, as required by Rule IV, that this court will not look into the record, but will affirm the judgment of the Circuit Court, because of such non-compliance with the rule.

Nevertheless it may be best to demonstrate that there is no error in the record. This will be made more apparent by a brief

STATEMENT OF THE CASE.

The plaintiffs below declared upon a promissory note (R. p. 1), and the defendant filed an exception (p. 2) amounting to a plea of *lis pendens*, or as it is termed at common law, *autre action pendant*, the action so pleaded being *in the same court.*

Upon the hearing of the plea, the court ordered plain-

tiffs to elect which suit they would proceed with (p. 7). Thereupon they elected to proceed with this suit, and discontinued the other suit, and paid the costs, and defendant's exception was dismissed (p. 7). By a supplemental petition the plaintiffs sought and obtained an attachment, and levied it upon the property of the defendant, (pp. 7, 8) which she bonded (p. 10).

The defendant moved to quash the attachment on the grounds that the bond was insufficient in amount, and that the plaintiffs had given no security (p. 11). The motion was denied.

No defence to the action was interposed, and a judgment was rendered by default, and the plaintiff's damages were assessed by a jury, and they had judgment (p. 16.)

ARGUMENT.

The record presents a case of a writ of error brought to reverse a judgment rendered *on default*, because, first, upon a plea of *lis pendens*, or *autre action pendant*, in the *same* court, the plaintiffs elected to discontinue that suit and proceed with this one; second, of error in interlocutory orders upon auxiliary conservatory proceedings.

I.

1. The plea of *lis pendens*, known to the civil law is a declinatory exception, and governed by the provisions of the Code of Practice, viz.:

"Art. 334. Declinatory exceptions do not tend to defeat the demand, but only to decline the jurisdiction of the judge before whom it is brought. In such cases the

defendant contends he is not bound to plead before the Court in which the action is brought."

"Art. 335. There are two kinds of declaintory exceptions:

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2. When it arises from the fact of another suit being pending between the same parties, for the same object, and growing out of the same cause of action, *before another court* of concurrent jurisdiction."

The suit so pleaded must be pending *in another tribunal of concurrent jurisdiction. Weeks vs Flower, et al.*, 9 La. 386; *Succession of Ludwig*, 3 Rob. 92. The suit was terminated by its discontinuance before the exception was dismissed. In such cases it falls. *Schmidt vs. Braunn*, 10 La. Ann. 26. In these respects our law differs from the common law.

We have assumed that by filing the petition and bond for removal of the first suit in the State court, the cause was *io instante* transferred to the Circuit Court. If, on the contrary, it remained in the State court until it was entered and docketed in the Circuit Court, then the plea was untrue, because it was not so entered, nor the transcript filed until after the plea was filed. (See plea and transcript, p. 2, 3).

The object of this suit was to avoid the delay which would follow if it should be held that we could not proceed in the cause removed, until the next term of the court. If the cause was not removed *io instante* by the filing of the petition and bond in the State court, the

plea must be held bad because the pendency of a suit in the State Court cannot be pleaded in abatement of a like suit in a Court of the United States. *Loring, et al. vs. Marsh, et al.*, 2 Cliff. 322; *White vs. Whitman*, 1 Curt. 494; *Lyman, et al. vs. Brown, et al.*, 2 Curt. 559; *Wadleigh vs. Vesey*, 3 Sumn. 165.

2. Complaint is made in the brief that the exception was tried without a jury. Even if the record be erroneous in showing a waiver of a jury, (which we do not admit) the defendant was represented upon the trial of the plea, (p. 6) and if any objection was made to the trial of the plea, without a jury, the defendant should have excepted and preserved her objection by bill. *Kearney vs. Case*, 12 Wall. R. 275.

II.

1. The Code of Practice prescribes the bond to be given in cases of attachment, viz.:

"Art. 245. A creditor, his agent, or attorney in fact, praying such attachment, must, besides, annex to his petition his obligation in favor of the defendant for a sum *exceeding one-half* that which he claims, with the surety of one good and solvent person residing within the jurisdiction of the Court to which the petition is presented, as a security for the payment of such damages as such defendant may recover against him in case it should be decided that such attachment was wrongfully obtained." C. P. Revision of 1870.

The bond herein is for $3,200, and *exceeded one-half* the amount of the plaintiffs' claim. Prior to 1870, the law was, as defendant contends; and the cases he cites all

arose under the former law, excepting possibly *Miller vs. Chandler*, 29 A. 90, which arose in 1870, but probably the bond was given before the adoption of the Code of Practice of 1870. At any rate, the point was not raised or considered, as the bond *exceeded* BY *one-half* the amount claimed, and the remark of the Court must be considered as inadvertently made.

A decision upon a like change of language in regard to appeal bonds is in point. Under the old Code of Practice, *Article* 575, in order to obtain a suspensive appeal, the appellant was required to give bond "in favor of the "appellee for a sum exceeding BY *one-half* the amount "for which the judgment was given."

In 1868, this article was amended generally, and upon this point, was so changed as to require a party taking a suspensive appeal to give bond "for a sum *exceeding one-* "*half* the amount for which the judgment was given," the word *by* being omitted.

Acts of Louisiana, 1868, p. 166.

In *Denton vs. Reading*, 22 La. Ann. 607, the appeal was taken after the passage of the act aforesaid, and a motion to dismiss the same was made, on the ground that the amount of the appeal bond did not *exceed* BY *one-half* the amount of the judgment. The Court finding the fact to be as stated, said:

"Under the provisions of the Act of the Legislature, "of September 29th, 1868, the bond is required to *exceed* "*one-half* the amount of the judgment. We find the law "so written, and see no grounds to authorize us to give

"it a different interpretation." And the motion to dismiss was denied.

It will be observed that the language of the original act is identical in each case, and the change of language is also identical. Surely, if the unambiguous language of a statute, reducing the amount of bond required to suspend the execution of a final judgment, pending an appeal therefrom, to a sum exceeding by the merest fraction, one-half the amount recovered; the same unambiguous language reducing the amount of an attachment bond, where only damages are secured thereby, which are always problematical, must be followed,—especially when the change is the solemn act of the legislature.

2. The sufficiency of the sureties upon the attachment bond was denied, but the Court decided them to be sufficient. This was a matter within the discretion of the Court, and its decision cannot be reviewed on error.

The proposition that errors in interlocutory orders on auxiliary conservatory proceedings, will authorize the reversal of a judgment upon the merits, is certainly a novel one.

We think the case a proper one for the application of rule XXIII.

The judgment should be affirmed with interest and damages.

Respectfully submitted,

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